

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX

JUN 1 9 2017

#### 75 Hawthorne Street San Francisco, CA 94105-3901

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

K. David Kohler President and Chief Executive Officer, Kohler Co. 444 Highland Drive Kohler, WI 53044-1515

and

Mr. Jonathan S. Martel Arnold & Porter LLP 601 Massachusetts Avenue, N.W. Washington, D.C. 20001-3743

Re: Request for Information Under § 208(a) of the Clean Air Act, 42 U.S.C. § 7542(a)

The United States Environmental Protection Agency ("EPA") hereby requires Kohler Co. and any of its affiliates ("Kohler or "you"), <sup>1</sup> to submit certain information as part of an EPA investigation to determine Kohler's compliance with Sections 203(a)(1) and 213(d) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7522(a)(1) and 7547(d), and the applicable nonroad spark-ignition (SI) regulations at 40 C.F.R. Parts 90, 1054, and 1068. Examples of engines regulated under these Parts include, but are not limited to, engines used in lawn mowers and generators. Appendix A provides definitions. Appendix B provides instructions for your responses to this Request for Information. Appendix C specifies the information that you must submit.

The EPA issues this Request for Information under Section 208(a) of the CAA, 42 U.S.C. § 7542(a). Under Section 208(a), the Administrator of the EPA may require any person who is subject to the CAA, 42 U.S.C. §§ 7521-7590, to perform tests and provide information necessary to determine whether the person is acting or has acted in compliance with the CAA and the regulations promulgated thereunder. The Administrator has delegated this authority to the undersigned Manager of Region 9's Air Enforcement Office, Enforcement Division.

<sup>&</sup>lt;sup>1</sup> See definitions in Appendix A.

You must submit this information to the EPA representative listed below within thirty (30) calendar days from the date of receipt of this Request for Information. Please carefully review the instructions, definitions, and specific requests as you prepare your response. If you anticipate being unable to fully respond to this Request for Information by this date, you must contact Ryan Bickmore by telephone at (415) 972-3058 or by email at Bickmore.Ryan@epa.gov to request an extension. Any such request must explain why an extension is necessary and include a proposed timeline for providing the requested information. The EPA will review your request and may extend the time in which your response must be provided to some or all of the questions.

Failure to provide the required information may result in the initiation of a civil action pursuant to Section 205(b) of the CAA, 42 U.S.C. § 7524(b). Failure to provide all requested information in its entirety, and in the format requested, may result in additional inquiries and penalties. It is important that your responses be clear, accurate, organized, and complete. We may regard any submitted information that is misleading, false, incomplete, or submitted without regard to its accuracy as a violation of the CAA and/or criminal statutes.

You must submit all requested information under an authorized signature with the following certification (provided in Appendix E):

I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are significant penalties for knowingly submitting false statements and information, including the possibility of fines or imprisonment pursuant to Section 113(c)(2) of the Clean Air Act, 42 U.S.C. § 7413(c)(2), and 18 U.S.C. §§ 1001 and 1341.

We may use any information submitted in response to this Request for Information in an administrative, civil, or criminal action.

You are entitled to assert a business confidentiality claim covering all or part of the information you submit in response to this Request for Information, in accordance with the procedures described in the Confidentiality of Business Information ("CBI") regulations, 40 C.F.R. Part 2, Subpart B. However, no CBI claim may be made with respect to emissions data as defined at 40 C.F.R. § 2.301(a)(2). You must specify the page, paragraph, and sentence when identifying the information subject to your CBI claim. Appendix D of this Request for Information specifies the assertion and substantiation requirements for business confidentiality claims. The EPA may, without further notice, provide the public with any information not subject to a CBI claim.

#### Please submit all requested information to:

Matt Salazar, Manager, Air Enforcement Office Enforcement Division Attn: Roshni Brahmbhatt, Environmental Engineer U.S. Environmental Protection Agency, Region 9 75 Hawthorne St. (ENF-2-1) San Francisco, CA 94105

Any questions concerning this Request for Information should be directed to Ryan Bickmore at (415) 972-3058 or <u>Bickmore.Ryan@epa.gov</u>.

Matt Salazar, P.E., Manager

Air & TRI Section Enforcement Division

EPA Region 9 – San Francisco

# Appendix A Definitions

- 1. All terms used in this Request for Information will have their ordinary meaning unless such terms are defined in the CAA, 42 U.S.C. §§ 7401 et seq., or the nonroad SI engine regulations found at 40 C.F.R. Parts 90, 1054, and 1068.
- 2. The term "calibration" means the set of specifications and tolerances specific to a particular design, version, or application of an engine component or assembly capable of functionally describing its operation over its working range.
- 3. The terms "document" and "documents" means any object that records, stores, or presents information, and includes, without limitation, email, writings, memoranda, contracts, agreements, records, or information of any kind, formal or informal, whether wholly or partially handwritten or typed, whether in computer format, memory, or storage device, or in hardcopy, including any form or format of these. All documents in hard copy shall also include attachments to or enclosures with any document.
- 4. The term "electronic control module" or "ECM" means a device that receives inputs from various sensors and output signals to control engine, vehicle, or equipment functions (e.g., a fuel injection system).
- 5. The term "nonroad engine" means an internal combustion engine (including fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under sections 7411 or 7521 of the Clean Air Act. Section 216(10) of the CAA, 42 U.S.C. § 7550(10). The term "nonroad engine" is further defined and clarified at 40 C.F.R. § 1068.30.
- 6. The term "spark-ignition" or "SI" means relating to a gasoline-fueled engine or any other type of engine with a spark plug (or other sparking device) and with operating characteristics significantly similar to the theoretical Otto combustion cycle.
- 7. The term "Subject Calibration" means the calibration used on Kohler's SI nonroad engines equipped with a Delphi ECM.
- 8. "Test Cycle A" and "Test Cycle B" refer to the test modes described in 40 C.F.R. § 1054.505(d)(1).
- 9. The term "you" and "your" includes, but is not limited to, Kohler, and any parent organization, affiliate, predecessor, successor, and assignee organization.

### **Appendix B Instructions for Responses**

- 1. Provide a complete, detailed response to each of the requests in Appendix C, below. Provide any narrative responses or lists in English, in both written document form and in electronic form (e.g., Word, Excel).
- 2. This Request for Information is a continuing request. You must promptly supplement your response to any request in Appendix C in the event you learn that you possess responsive information not yet produced or if you gain possession, custody, or control of responsive information after initially responding to this Request for Information.
- 3. For each answer, please provide the number of the request to which it responds and identify each person who provided information that was used to prepare that answer. For each document produced, please provide the number of the request to which it responds. Where information is responsive to more than one numbered request, provide that information only once, but indicate the numbers of all requests to which the information is responsive.
- 4. Where documents or information necessary for a response are not in your possession, custody or control, indicate in your response why such documents or information are not available or in your possession, custody or control, and identify any source that either possesses or is likely to possess such information.
- 5. All submitted documents should be copies and not original documents.
- 6. Where you have previously submitted information to the EPA that is also the subject of these requests, re-submit that information in accordance with these instructions (Appendix B). Identify the material that was previously provided, the date on which it was provided, how the information was provided (e.g., electronically, mail), and the individual at EPA to whom it was provided.

#### Appendix C Information Request

- 1. Identify all model year (MY) 2011 through 2016 engine families with engines equipped with a Delphi ECM.
- 2. For each engine family identified in response to Question 1, provide the following:
  - a. A list of each model sold within that engine family;
  - b. The high speed no-load set point for each model;
  - c. The average governor droop for each model;
  - d. The number of engines sold per model;
  - e. Requests from customers to increase engine power or change the engine speed; and
  - f. The results of all emissions tests conducted prior to January 1, 2016.
- 3. Provide all documents generated prior to January 1, 2016, including internal discussions between Kohler employees, regarding the appropriate test cycle to use—i.e., Test Cycle A or Test Cycle B—for any Kohler nonroad SI engines.
- 4. Describe Kohler's standard procedures for calibrating its electronic-fuel injected (EFI) engines, including how long this effort typically takes.
- 5. Identify each Kohler employee or contractor, including those who may no longer be employed by or under contract with Kohler, who was involved in the development, design, testing, or approval of the Subject Calibration. Include:
  - a. Name;
  - b. Job title (former and current if changed);
  - c. Organizational group/business unit;
  - d. Work location;
  - e. Work email address;
  - f. Time period of involvement; and
  - g. A description of their general roles and responsibilities, and their specific roles and responsibilities with regard to the Subject Calibration.

- 6. Provide all documents, including internal discussions between Kohler employees, regarding the development, design, testing, or approval of the Subject Calibration. This includes, but is not limited to, documents relating to:
  - a. The development and design of the calibration strategy (including open loop threshold) between approximately 2900 and 3100 revolutions per minute (rpm);
  - b. The rationale for calibrating the engines to run richer and with less spark advance at speeds between approximately 2900 and 3100 rpm than at speeds greater than 3100 rpm;
  - c. The impact of the Subject Calibration on certification testing or fuel economy;
  - d. The impact of the Subject Calibration on emissions under Test Cycle A versus Test Cycle B;
  - e. The representativeness of certification testing emissions compared to real-world operation; and
  - f. The benefits of utilizing the Subject Calibration from a fuel economy or emissions credit perspective.
- 7. If the Subject Calibration was modified over time, identify the changes that were made and provide a detailed explanation of the basis for any significant modifications to the Subject Calibration. This description should include a list of all tests run pursuant to Kohler's design verification plan after a major recalibration effort, along with a short description of each test and the approximate amount of time required to complete each test.
- 8. Provide all presentations made to Kohler's management or supervisory boards, or any committees or panels thereof, concerning the design, development, marketing, and sale of nonroad SI engines equipped with the Subject Calibration.

# Appendix D Confidential Business Information

You may assert a business confidentiality claim covering all or part of the information you provide in response to this Request for Information for any business information entitled to confidential treatment under Section 208(c) of the CAA, 42 U.S.C. § 7542, and 40 C.F.R. Part 2, subpart B. Under Section 208(c) of the CAA, you are entitled to confidential treatment of information that would divulge methods or processes entitled to protection as trade secrets. Under 40 C.F.R. Part 2, subpart B, business confidentiality means "the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information." 40 C.F.R. § 2.201(e).

Information covered by a claim of business confidentiality will be disclosed by the EPA only to the extent, and by means of the procedures, set forth in Section 208(c) of the CAA and 40 C.F.R. Part 2, subpart B. The EPA will construe your failure to furnish a business confidentiality claim with your response to this Request for Information as a waiver of that claim, and the information may be made available to the public without further notice to you.

To assert a business confidentiality claim, you must place on (or attach to) all information you desire to assert as business confidential either a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," "confidential business information," or "company confidential" at the time you submit your response to this Request for Information. Allegedly confidential portions of otherwise non-confidential documents should be clearly identified, and may be submitted separately to facilitate identification and handling by the EPA. You should indicate if you desire confidential treatment only until a certain date or until the occurrence of a certain event.

The criteria the EPA will use in determining whether material you claim as business confidential is entitled to confidential treatment are set forth at 40 C.F.R. §§ 2.208 and 2.301. These regulations provide, among other things, that you must satisfactorily show that: (1) the information is within the scope of business confidentiality as defined at 40 C.F.R. § 2.201(e), (2) that you have taken reasonable measures to protect the confidentiality of the information and that you intend to continue to do so, (3) the information is not and has not been reasonably obtainable by legitimate means without your consent, and (4) the disclosure of the information is likely to cause substantial harm to your business competitive edge. *See* 40 C.F.R. §§ 2.208 (a)-(d). Emission data, as defined at 40 C.F.R. § 2.301(a)(2), is expressly not entitled to confidential treatment under 40 C.F.R. Part 2, subpart B. *See* 42 U.S.C. § 7542(c); 40 C.F.R. § 2.301(e).

If you assert a claim of business confidentiality in connection with information and documents forwarded in response to this Request for Information, in accordance with 40 C.F.R. § 2.204(e)(4), the EPA is requesting that you answer the following requests with respect to any information or document for which you assert a claim of business confidentiality:

- 1. What specific portions of the information are alleged to be entitled to confidential treatment? Specify by page, paragraph, and sentence when identifying the information subject to your claim.
- 2. For what period of time do you request that the information be maintained as confidential (e.g., until a certain date, until the occurrence of a specified event or permanently)? If the occurrence of a specific event will eliminate the need for confidentiality, specify that event. Additionally, explain why the information should be protected for the time period you have specified.
- 3. What measures have you taken to protect the information claimed as confidential from undesired disclosure? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?
- 4. Is the information contained in any publicly available material such as the Internet, publicly available databases, promotional publications, annual reports or articles? Is there any means by which a member of the public could obtain access to the information? Is the information of a kind that you would customarily not release to the public?
- 5. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.
- 6. For each category of information claimed as confidential, explain with specificity whether disclosure of the information is likely to result in substantial harm to your competitive position. Explain the specific nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effect. How could your competitors make use of this information to your detriment?
- 7. Is there any other explanation you deem relevant to the EPA's determination of your business confidentiality claim that is not covered in the preceding requests? If so, you may provide such additional explanation.

You must furnish comments to the above requests concurrent with your response to this Request for Information if you have claimed any information as business confidential. *See* 40 C.F.R. § 2.204(e)(2). Pursuant to 40 C.F.R. § 2.205(b)(2), you may request an extension of this deadline.

The EPA will construe your failure to furnish timely comments as a waiver of your confidentiality claim, consistent with 40 C.F.R. § 2.204(e)(1). Please submit your comments to:

Ryan Bickmore, Attorney-Advisor Office of Regional Counsel U.S. Environmental Protection Agency, Region 9 75 Hawthorne Street, 12<sup>th</sup> Floor (ORC-2) San Francisco, CA 94105

Pursuant to 40 C.F.R. § 2.205(c), you are hereby advised that information you submit as part of your comments may be entitled to confidential treatment if, when it is received by the EPA, it is marked in accordance with 40 C.F.R. § 2.203(b). As required by 40 C.F.R. § 2.204(e)(6), you may assert a business confidentiality claim covering all or part of your response to these requests, as provided in 40 C.F.R. § 2.203(b). Information covered by such a business confidentiality claim will be disclosed by the EPA only to the extent, and by means of the procedures, set forth in Section 208(c) of the CAA and 40 C.F.R. Part 2. The EPA will construe the failure to furnish a confidentiality claim with your comments as a waiver of that claim, and the information may be made available to the public without further notice to you.

## **Appendix E Statement of Certification**

You are submitting the enclosed documents in response to the U.S. Environmental Protection Agency's ("EPA") Request for Information, issued pursuant to Section 208(a) of the Clean Air Act, to determine compliance with the Clean Air Act and its affiliated regulations. I certify that I am fully authorized by \_\_ [corporate affiliation] to provide the above information on its behalf to EPA. I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are significant penalties for knowingly submitting false statements and information, including the possibility of fines or imprisonment pursuant to Section 113(c)(2) of the Clean Air Act, 42 U.S.C. § 7413(c)(2), and 18 U.S.C. §§ 1001 and 1341. Date: Name (Printed): Signature:

Title: